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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 244

FRANCESCO VIENI,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on May 18, 1950, affirming a judgment of the Supreme Court of the State of New York, Appellate Division, First Department, which in turn affirmed a judgment of the Court of Special Sessions of the City of New York, County of New York, convicting petitioner of a violation of Section 422 of the Public Health Law of the State of New York, unlawfully possessing a narcotic drug.

Opinions Below

Neither the trial court, the Court of Special Sessions of the City of New York, nor the Supreme Court of the State of New York, Appellate Division, First Department, rendered any opinions. The Court of Appeals of the State of New York, in affirming the judgment of the intermediate appellate court, filed the following memorandum decision:

> "People, etc., res. v. Francesco Vieni, ap.—Judgment affirmed. Upon this appeal, there was presented and necessarily passed upon, a question under the Constitution of the United States, viz.: Appellant contended that the use against him upon the trial of evidence acquired by illegal search and seizure violated the Fourth Amendment of the Constitution of the United States. This court held that the conviction herein was not improper by virtue of the admission of such evidence, and that its use did not deprive appellant of his rights under said amendment nor of due process (People, etc. v. Defore, 242 N. Y. 13; People, etc. v. Richter's Jewelers, Inc., 291 N. Y. 161; Wolf v. Colorado, 338 U. S. 25). No opinion. All concur.
>
> May 18, 1950."

Jurisdiction

The jurisdiction of this court is invoked under Rule 37(b) of the Rules of Criminal Procedure and Title 28, Section 1254, United States Code.

Questions Presented

1. Despite the holding in *People* v. *Defore,* 242 N. Y. 13, decided before the adoption of Article 1, Section 12, amending the Constitution of the State of New York (November 8, 1938) and that in *People* v. *Richter's Jewelers, Inc.,* 291 N. Y. 161, decided after its adoption, should not the evidence

in this case have been suppressed if found to have been obtained as a result of an unlawful search and seizure in violation of the petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution, since it was made by federal law enforcement officers and not by state or municipal officers?

2. Should not the petitioner's attorney's motion to dismiss the information for the reason that the evidence upon which it was based was obtained by Federal law enforcement officers in violation of petitioner's constitutional rights as above set forth, have been granted?

3. Does not the fact that an unlawful seizure and search was made by Federal officers render the evidence procured thereby inadmissible upon the trial of the case in the State court, when such evidence could not have been used in the Federal court?

Provisions of Law Involved

United States Constitution—Amendment IV—Searches and Seizures:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York State Constitution—Article 1, Section 12—Security Against Unreasonable Searches, Seizures and Interceptions. The applicable portion reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, sup-

ported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It will be seen that the wording is identical in both the Federal and State Constitutions.

Statement

The petitioner was apprehended by Federal narcotic agents on February 12, 1948 at 850 West End Avenue, New York City on the charge of possessing a narcotic drug, to wit: heroin (ff. 11, 12*).

He was not arraigned before a United States Commissioner although such possession is a crime under the Federal laws (Sections 173, 174, Title 21, United States Code; Sections 2552, *et seq.*, Title 26, United States Code). Instead, on the following day, February 13, 1948, he was brought to the 24th Precinct Police Station by the narcotic agents who turned him over to Detective O'Grady of the New York City police (f. 69). Detective O'Grady received the evidence in this case from Agent Costarella. Agent Valerio had taken it the day before from the petitioner's shirt pocket (ff. 70, 65). Detective O'Grady did not sign the complaint in the case but made the formal arrest at the request of the Federal officer, Costarella, who acted as the complainant (f. 71). O'Grady knew nothing of the circumstances of the case except as detailed to him by Costarella and Valerio (f. 72).

These circumstances were as follows: On February 12, 1948, at about 8 P. M., the Federal agents, Costarella and Valerio were about to leave Room 104 at 850 West End Avenue, New York City, when the petitioner appeared with another unidentified person (ff. 39, 63). At the time of his arrival, the agents saw no narcotics on the petitioner's per-

* References are to folios in the printed record.

son, nor did any of their senses suggest to them that the petitioner was in possession of a narcotic drug (ff. 40, 67). While the witness, Costarella, attempted to deny that he had placed petitioner under arrest prior to the search of his person (ff. 40, 41), yet he and the other agent, Valerio, frankly stated that the petitioner was *invited* into Room 104 by being ordered to come into said room after they had displayed their official shields and thus indicated their authority as agents of the United States Treasury Department (ff. 42, 43, 64, 67). As soon as petitioner entered the room, the agents laid hold of him and began to search him by going through his pockets (ff. 43, 44, 47, 64, 65). In his shirt pocket they found People's Exhibit 1 (p. 35) an opaque coin envelope containing 23 heroin capsules (ff. 33, 50, 53). Prior to the removal of People's Exhibit 1 from the petitioner's shirt pocket, and the examination of its contents, the narcotic agents had no probable cause for believing that it contained heroin and none of their senses of sight, smell, feeling or hearing indicated to them that such was the fact. This was readily admitted by the agents (ff. 53, 54, 55, 67). It was only after the search that this was ascertained (ff. 55, 67).

The said narcotic agents admittedly had no search warrant authorizing a search of petitioner's person (ff. 54, 66). Considering the narcotic agents' testimony, no claim was or could be made by the People that petitioner consented to the search (*United States* v. *Hoffenberg*, 24 F. Supp. 989, 990; *Ray* v. *United States*, 84 F. 2d, 654, 656; *Amos* v. *United States*, 255 U. S. 313; *United States* v. *Slusser*, 270 Fed. 818; *Salata* v. *United States*, 286 Fed. 125).

POINT I

The evidence in this case having been obtained by Federal officers by the violation and invasion of the petitioner's right to immunity from the search of his person without probable cause, under the Fourth Amendment of the United States Constitution, it should have been suppressed and the motion to dismiss the information granted.

In the United States courts the protection of the rights, immunities and privileges afforded by the Fourth Amendment against unreasonable searches and seizures is applied with the meticulousness required by the adjudicated cases. No distinction is made between persons of the highest respectability and those of the utmost depravity.

In *Weeks* v. *United States*, 232 U. S. 392, the United States Supreme Court said:

> "This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws: The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." (See also, *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Agnello* v. *United States*, 269 U. S. 20.)

The successful effect and result of a search does not validate it if illegal in its inception and the right to search without a warrant depends on the situation disclosed be-

fore the search was made. *United States* v. *Sully,* D. C. N. Y., 56 F. Supp. 942; *Byars* v. *United States,* 273 U. S. 28; *United States* v. *Spallino,* 21 F. (2d) 567; *United States* v. *Slusser,* 270 Fed. 818; *United States* v. *Costanzo,* 13 F. (2d) 259; *United States* v. *Bush,* 269 Fed. 455; *People* v. *Martin,* 382 Ill. 192 *United States* v. *Fitzmaurice,* 45 F. (2d) 133.

Obviously then it is the holding of these cases that the rights, privileges and immunities afforded a defendant by the provisions of the Fourth Amendment to the United States Constitution accrue to and vest in him as of the time before the commencement of the search. These cannot be divested because the search is successful in disclosing evidence or fruits of crime.

POINT II

Officers of the United States Government having committed an *unlawful* act in making an illegal search and seizure of petitioner's person and property, in violation of his constitutional rights, their act cannot be made *lawful* by transferring the prosecution to the State court, where the rule as to the admissibility of evidence so unlawfully obtained is different from that prevailing in the United States District Court, thus aborting the petitioner's rights, privileges and immunities under the Fourth and Fifth Amendments of the United States Constitution.

In its memorandum decision affirming the conviction of petitioner, solely upon evidence, the result of an unreasonable search of petitioner's person and the seizure of his property without probable cause, the Court of Appeals of the State of New York, relied upon its decisions in *People, etc.* v. *Defore,* 242 N. Y. 13 and *People, etc.* v. *Richter's Jewelers, Inc.,* 291 N. Y. 161 and the decision of this Court in *Wolf* v. *Colorado,* 338 U. S. 25.

The said cases had for consideration evidence obtained by State law enforcement officers. In the case at bar, the evidence was secured by Federal officers. Therein lies the difference between the instant case and the *Defore* case, the *Richter's Jewelers* case, *supra,* and the case of *Wolf* v. *Colorado, supra.*

By not arraigning petitioner in the United States District Court and by transferring the prosecution first to the Magistrate's Court and then to the Court of Special Sessions, he was by a species of circumvention, divested of those rights, privileges and immunities guaranteed by him by the Fourth Amendment of the United States Constitution without any warrant in law. Obviously, the narcotic agents must have known the futility of attempting to convict the petitioner in the United States District Court upon evidence obtained in the manner to which they testified. The petitioner was incarcerated and it was not until 3:10 P. M. the following day that he was brought to Detective O'Grady thus initiating the prosecution in the state courts.

Life under a dual sovereignty, *i.e.,* federal and state, does not require a citizen to forego the protection of the Fourth and Fifth Amendments to the United States Constitution at the whim and caprice and for the convenience of enforcement and prosecuting officials. This should certainly be so when the evidence against him is the result of an unlawful search and seizure by Federal law enforcement officers who have taken an oath to support the Federal Constitution.

In *Walters* v. *Commonwealth,* 199 Ky. 182, 250 S. W. 839, 841, the Court used this language in deciding this proposition:

> "But as the same act of a citizen of both a state and the United States renders him amenable to both sovereignties under which he must live, if each but protects under similar guarantees of their respective Constitutions against unlawful activities of its own officers, it would result that state officials might search a citizen

without a warrant, and the evidence thus unlawfully obtained be used against him in the federal courts, and he likewise would be without protection in the state courts against unreasonable searches by federal officers other than by an action for damages, which both the courts of this commonwealth and of the United States have held inadequate.

Surely the same guarantees by the dual sovereignty mean more than that, and they should be so construed as more effectively to protect the citizen's immunities from governmental interference, which each within its sphere has declared sacred."

No finer and no more exhaustive comment on this point can be found than in *State* v. *Rebasti*, 306 Mo. 336, 267 S. W. 858.

This case involved the suppression of evidence obtained as the result of an illegal search based on an invalid warrant. The information for the warrant was furnished by a municipal police officer to a federal officer who made the affidavit upon which the search warrant was issued. Municipal police accompanied the Federal officers but did not participate in the search. Evidence consisting of the fruits of the unlawful search was offered in the State court.

In upholding the application to suppress the evidence so obtained, the Court said:

"A different question is presented when we consider the claim that the production of the evidence obtained was in violation of the defendant's rights under the Federal Constitution. State courts are as much under an obligation to protect the rights of defendant guaranteed him by the United States Constitution as those guaranteed him by the Constitution of this State, and the Federal Supreme Court may review the action of this court in consideration of this question. We are bound to follow the rules of the Federal Court in respect to this particular matter.

* * * * * *

It is contended that because this case arises in the State Court, and not in a Federal court, this court cannot take notice of the restriction of the Fourth and Fifth Amendments to the Federal Constitution.

It is unthinkable that a State court is powerless to protect the constitutional rights of its citizens guaranteed by the Federal Constitution. To hold the evidence of the Federal agents admissible in this case is to pronounce that doctrine. It is to say that the act of an officer or of any other individual, is lawful or unlawful, not on account of the character of the act, but on account of the court in which it is called in question.

The restrictions of the Fourth and Fifth Amendments to the Federal Constitution apply only to Federal officers. The like restrictions in the State Constitution apply only to State officers. When a case arises in a Federal court and a State officer, as a witness, is asked to give evidence discovered by him in an unreasonable search, and the provisions of the Federal Constitution are invoked in objection to his testimony, the court always holds that he may testify because the restrictions of the Federal Constitution do not apply to him.

Likewise, in a State Court, when a Federal official is offered as a witness and is asked to testify to some facts which he discovered by an unreasonable search, and the State constitution is cited in objection, his evidence is held competent because the restrictions of the State Constitution do not apply to him. *But when a Federal officer is offered as a witness in a State court, and his evidence is objected to because discovered in violation of the Federal Constitution, no case is cited where it is held admissible.*

Such constitutional restrictions of Federal officers and State officers always apply wherever they are called in question.

Suppose a Federal officer should make an unreasonable search, and in doing so outrage the citizen's rights under the United States Constitution can it be said that the unlawful act of the officer could become lawful because of the court in which it is questioned? Suppose the injured citizen should sue him in the State court for damage done in violation of his constitutional rights, and the officer in defense should plead that, although he acted unlawfully, the plaintiff had no right to prove it in a State court. Does anyone suppose the plea would be good?

In this case the Federal officer violated the constitutional rights of the defendant, and violated the constitutional restrictions on his own behavior as a Federal officer. Had the case been pending in the Federal court he could not have testified, because his act in procuring his information was *unlawful*. His case, however, is pending in the State court and it is contended that he may testify because his act was *lawful*. By that theory his act becomes lawful or unlawful, not because of its quality, but because of the court which decides the question. He can bring his misdemeanor to a State court and there have his lawless disregard of his official duty appraised as a meritorious performance.

Numerous cases are cited in support of the opposite view, where it is said that the amendments to the Federal Constitution are intended to limit the powers of the *national government* alone and do not affect the powers of the *state governments*. This is construed by the prosecution to mean that the restrictions of the national government do not affect State courts. But the cases cited do not so hold. Where the opinions in such cases hold that the Fourth and Fifth Amendments to the Federal Constitution operate upon the Federal Government only and not upon the State government, they mean, of course, the agents of the Federal government. If those amendments are intended to restrain the actions of Federal officers, why should it ever be held that under certain conditions they do not restrain them?

The case of *People* v. *Adams*, 176 N. Y. 1. c. 356, is cited, where it is said that the Fourth and Fifth Amendments to the Constitution of the United States do not apply *to actions in state courts*. That statement is purely obiter. The facts in the case do not warrant any such statement of the law. In no case has it ever been held, so far as I can discover, that an unlawful act of a Federal officer becomes lawful where brought into question in a State court, or that the evidence of a Federal official, which would be held incompetent in the Federal court on account of the restrictions of the Fourth and Fifth Amendments, becomes competent when offered in a State court.

> Consider the consequences that would flow from holding that a Federal officer may testify in a State court to a fact discovered by an unlawful search in violation of the Federal Constitution. Suppose a State Sheriff and a Federal Marshal should act together. They could go anywhere, search any premises or any person, without a warrant, without authority, in entire disregard of constitutional restrictions upon each. Cases come up in the Federal court and in the State court in which they are called upon to testify to facts discovered in their unlawful depredations. If the evidence in this case is admissible, then the Federal officers could testify in the State courts to what they would not be allowed to say in the Federal court, and the State officers could testify in the Federal court to what they would not be allowed to say in the State court. Thus they would make out a case in each court in utter defiance of the constitutional restrictions on each of them.
>
> *The only safe and sound construction of the situation is to say that when a Federal officer violates the constitutional restriction upon his conduct so as to make evidence procured in such violation incompetent, that it is incompetent everywhere offered.*" (Emphasis supplied.)

It is true that in this case the petitioner is only a narcotic addict but his constitutional rights are no less important to him than if he were a respectable banker. In the abstract, the constitutional question involved is more important to the public generally and to the courts which are charged with the duty of supporting the constitution of the State of New York, and the supreme law of the land, the United States Constitution (*Weeks* v. *United States, supra; Martinelli* v. *Valentine*, 179 Misc. 486, 488).

When one considers that the United States Criminal Code (Title 18) denounces the same acts as crimes as does the New York State Penal Law, with the exception of violations of the Immigration and Naturalization Laws, Interstate Commerce Law, Internal Revenue Law and possibly some few other laws which are because of their very nature wholly Federal in character and scope, the danger

to the effectiveness of the protection of the Fourth and Fifth Amendments to the citizen, stands out in bold relief.

The holding the Court of Appeals of the State of New York serves but to encourage the lawless enforcement of the law (See Maguire, Evidence: Common Sense and Common Law, 124-5).

The practice pursued in this case of prosecuting in the state courts, a defendant arrested by Federal officers for what is a Federal offense, in order to insure a conviction where none could be had in the Federal courts because of the manner in which the evidence was obtained, is frankly pernicious. It has been relied upon only too frequently in recent years and should be stopped. It is only a means of circumvention to deprive a defendant of his constitutional rights and should not be countenanced. It can best be described in the words of the late Mr. Justice Murphy in writing the dissenting opinion in *Wolf* v. *Colorado, supra*, wherein he said it "is indeed shabby business: lawlessness by officers of the law."

CONCLUSION

The importance of the questions presented warrants the granting of the petition.

Respectfully submitted,

HENRY K. CHAPMAN,
Attorney for Petitioner.

SEP 9 1950
CHARLES ELMORE CROP

Supreme Court of the United States

October Term, 1950

No. 244

FRANCESCO VIENI,

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against

PEOPLE OF THE STATE OF NEW YORK

Respondent,

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner was convicted on June 8, 1948, in the Court of Special Sessions of the City of New York, of UNLAWFULLY POSSESSING A NARCOTIC DRUG (New York Public Health Law, §422; New York Penal Law, §1751-a). A sentence of 6 months in the Workhouse was suspended during good behavior (101 *). The judgment was unanimously affirmed, without opinion, by the Appellate Division of the New York Supreme Court, First Dept., and, on May 18, 1950, by the New York Court of Appeals [301 N. Y. 535, 93 N. E. (2d) 345]. Petitioner now seeks certiorari [28 U. S. C. §1257(3)].

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* References are to folios in the record of trial.

Introduction

At the trial, two federal officers testified that on February 12, 1948, they searched petitioner in a room at 850 West End Avenue and found in his pocket twenty-three capsules of heroin (31-3, 47-51, 56-9, 61-5). The facts known to them which led them to make the search were not elucidated (*cf.* 39-43, 54-5, 65-7).

A New York City police officer testified that he took petitioner into custody when he received the heroin from the federal officers and that the petitioner admitted to him that he had had the drug in his possession (68-72).

Petitioner does not dispute that he in fact committed the crime charged (24-6, 29). His only claim here—one specifically considered by the Court of Appeals—is that the State courts committed constitutional error in refusing to dismiss the information on the ground that the search which disclosed the incriminating evidence violated his constitutional rights (79-80, 89-90).

POINT I

Certiorari should be denied.

Petitioner contends that the use against him of evidence acquired by illegal search and seizure violated the Fourth Amendment of the Constitution of the United States (petition pp. 6-13). This is without merit.

Petitioner was tried in a New York State court for a violation of New York State's narcotic laws. The use in that trial of evidence illegally obtained did not deprive him of his rights under the Fourth Amendment of the Constitution of the United States nor of due process of law [*Wolf* v. *Colorado,* 338 U. S. 25; *People* v. *Polizio* (1949) 298 N. Y. 814, 83 N. E. (2d) 861, cert. den. 337 U. S. 957; *People* v. *Defore* (1926) 242 N. Y. 13, 150 N. E. 585, cert. den. 270 U. S. 657].

The identity of the officers who made the seizure cannot affect the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1950